IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14/07/2003

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice M. THANIKACHALAM

W.A. No.1795 OF 2003

First International Line S.A. Panama
Arrango Orrillac Building
546th Street, III Floor
Nuevo Urbanizacion Obianio
Postal Box Panama 5
Republic of Panama
rep. by its Indian Representative
Capt. C. Sathyanarayana ... Appellant

-Vs-

1. M/s. Chokhani International Ltd.
Chennai 600 001

2. M/s. D.B. Madan and Company
Chennai 600 006

3. The Registrar General
High Court
Chennai 600 104 ... Respondents

Appeal under Clause 15 of the Letters Patent against
the order dated 17-4-2002 made in W.P. No.40655 of 2002

!For Appellant :: Mr. Sriram Panchu
Senior Counsel for
Mr. N.L. Rajah

^For Respondents :: Mr. S. Sampathkumar
Senior Counsel for
M/s.Sampathkumar & Associate
(for R1)
M/s. P.S. Raman for R2

:JUDGMENT

V.S. SIRPURKAR, J.

The present writ appeal is directed against the order of the learned single Judge of this Court, dismissing the writ petition filed on behalf of the appellant herein, who had challenged therein the order passed by the Hon□ble Chief Justice on the administrative side.

2. The appellant had approached the Hon□ble Chief Justice against an order passed by the arbitral tribunal whereby, the arbitral Tribunal had refused to join the appellant has the party to the arbitration proceedings. This application to join the appellant as a party to the arbitral tribunal was made not by the appellant but by the first respondent herein M/s. Chokhani International Limited, Chennai. The appellant had approached the Hon□ble Chief Justice by way of two applications, A.Nos.5624 and 5720 of 2001. While by the first application, the appellant sought to be impleaded as a party and more particularly as the third respondent in O.P. No.972 of 1997 while by the other application, the proceedings before the arbitral tribunal were sought to be stayed. In the first mentioned application, the appellant prayed for the recall of the order passed by Justice Akbar Basha Khadri, delegate of the Hon□ble Chief Justice under Sec.11 of the Arbitration and Conciliation Act, 1996 (in short □the Act□) dated 25-6-1998 in O.P. No.972 of 1997 and for that purpose the appellant sought its impleadment in that original petition which was already disposed of by the aforementioned order passed by Justice Khadri. The Hon□ ble Chief Justice dismissed both the applications and it was the order of the Hon□ble Chief Justice, which was challenged before the learned single Judge of this Court to which the reference has already been made in the opening paragraph of this judgment. The following facts will highlight the controversy.

3. The appellant is a foreign company, having its registered office at Panama. It claims to be the owner of the merchant vessels, m.v. Coromandel Clipper (formerly known as m.v. Mikhail Olminskiy) and m.v. Fedor Petrov. The second respondent herein, or as the case may be, one company known as M/s. Madan Shipping (Private) Limited, was the agent of the appellant, responsible for booking cargo and doing all port operations and the commercial operations for the territory of India.

3.1. The said two vessels required some repairs to be done at Chennai where, at the relevant time in the year 1996, the said two vessels were berthed. The said agent floated enquiries for the dry docking of the said vessels and received tentative quotations from the first respondent which had the dry docking facility in Chennai port. The initial enquiries were made by the first respondent from the second respondent M/s. D.B. Madan and Company and its sister concern M/s. Madan Shipping (Private) Limited as agents for the aforesaid two vessels.

3.2. The vessels were entrusted to the first respondent for drydocking and effecting various repairs. The first vessel was entrusted on 31-8-1996, the repairs of which were completed by 17-10-1996 so also, the second vessel was entrusted on 27-9-1996 and the repairs were completed on 30-11-1996 though the repairs were agreed to be made within ten days of the delivery of the said vessels to the first respondent.

3.3. In the dispute that followed in respect of the repair charges, the said agent or as the case may be the second respondent raised

several objections on the correctness of the same and claimed that the owner of the said vessels had suffered huge losses on account of repairing. The first respondent did not relent and exercised lien over the release of the said vessels. There were fresh talks between the first respondent and the second respondent and an agreement was entered into on 13-11-1996 by which, the first respondent agreed to accept certain amount in respect of the repairs done to the said two vessels while as regards the disputed amounts, respondents 1 and 2 agreed to appoint one arbitrator each and refer such disputes to the arbitration. By letter dated 13-11-1996, it was further agreed that the counter-claims, which may be raised, should also be referred to arbitration. This letter was signed by the second respondent as the agent of the appellant. After the settlement of the agreed amounts, the said two vessels were also released.

4. On behalf of the second respondent, one Captain Pullat was appointed as Arbitrator while the first respondent appointed Hon□ble Mr. Justice S. Mohan, a retired Judge of Supreme Court of India as the arbitrator. The two arbitrators did not agree upon a third arbitrator and hence, the first respondent filed O.P. No.972 of 1997 under Sec.1 1(4)(b) of the Act praying the Hon□ble Chief Justice of this Court to pass an order appointing the third arbitrator. The delegate of the Hon□ble Chief Justice, Hon□ble Mr. Justice Akbar Basha Khadri, as His Lordship then was, passed the orders on 25-6-1998, appointing Hon□ ble Mr. Justice S.Natarajan, retired Judge of the Supreme Court, as the third arbitrator/umpire.

5. The first respondent then lodged the claim before the arbitral tribunal but mentioned only M/s. Madan Shipping (Private) Limited as the sole respondent. In January 2001 M/s. Madan Shipping (Private) Limited filed its reply-statement objecting to the proceedings on the ground of non-joinder of the necessary parties. In March, 2001, the first respondent filed an application to implead the foreign-owner of the said two vessels, appellant herein, as well as the appellant□s agent, viz. M/s. D.B. Madan and Company as parties to the arbitration.

6. The appellant filed a counter before the arbitral Tribunal in which, as already stated, it raised objections to the impleading stating that since it is the foreign company, the procedure for arbitration that needs to be followed would only be the procedure for the International Commercial Arbitration as defined in Sec.2(1)(f) of the Act and consequently, only the Hon□ble Chief Justice of India, under Sec.11(9) of the Act, was the proper authority to appoint the third or the sole arbitrator. It also raised a plea that it had a counterclaim but it could file the same only before the properly constituted forum of the International Commercial Arbitration.

7. The Tribunal passed orders on the impleading application on 20-11-2000. The Tribunal rejected the plea that the entire arbitration was ab initio defective, null and void and allowed the impleadment of the second respondent herein as it came to the conclusion that M/s. D.B. Madan and Company (second respondent herein) and M/s. Madan Shipping (Private) Limited were the sister concerns with the common Directors and both acted for each other in the matters herein. The Tribunal, however, refused to implead the

appellant as the party taking the view that it could not enhance the scope of arbitration nor could it add a new party altogether to the arbitration proceedings.

8. It was the appellant who approached the Hon□ble Chief Justice of this Court in December 2001 by filing applications (Application Nos.5624 and 5720 of 2001), praying for impleadment in O.P. No.972 of 199 7 and seeking recall of the order passed by the court on 25-6-1998, appointing the third arbitrator. The Hon□ble Chief Justice passed an interim order on 5-4-2002 that the examination of the witnesses could proceed but the arbitral tribunal was not to proceed with the hearing of the final argument and was also not to pass an award till the disposal of the application. Ultimately, the Hon□ble Chief Justice passed orders on 12-9-2002 dismissing the applications holding that the earlier order passed by the Justice Khadri dated 25-6-1998 was purely an administrative order and could not be recalled. It was further held that the arbitral tribunal had no power to implead any party to the arbitration except those which were already parties in O.P. No.972 of 1997 and that the claimants have taken their own risk in proceeding with the claim as against the agent without making the appellant as party to the proceedings. It was this order which was challenged before the learned single Judge by the appellant which claim was dismissed, resulting in this appeal.

9. Learned single Judge has not accepted the claim of the appellant that this was an international commercial arbitration and as such the domestic arbitral tribunal had no jurisdiction to proceed with the same. The learned single Judge has extensively gone into the documents filed by the parties and came to the conclusion that right from the beginning, there was no trace of the appellant in the aforementioned transactions. The vessels were handed over for repairs to the first respondent by the second respondent and it was only the second respondent which was all along in picture. The learned single Judge also accepted the contention raised by the first respondent that all the negotiations regarding the repairs of the vessels were with M/s. D. B. Madan Shipping (Private) Limited or as the case may be with its sister concern M/s. D.B. Madan and Company and at no point of time, the owner of the said vessels ever came into the picture. The learned single Judge has also accepted the contention of the first respondent that its disputes right from the inception to the end were against M/ s. D.B. Madan and Company or as the case may be M/s.Madan Shipping (Private) Limited and that the first respondent was prepared to take the risk of going ahead with the arbitration proceedings only against the agent and not against the owner of the vessels. We must immediately hasten to add that even in this Court this very stand is taken by Shri Sampathkumar, learned counsel for the first respondent. The learned single Judge has relied upon the correspondence between the first respondent and the second respondent as also between M/s.Madan Shipping (Private) Limited and referring to the letter dated 13-11-1 996 reiterated that in the third paragraph of this letter it was M/s.D.B. Madan and Company or as the case may be M/s.Madan Shipping (Private) Limited which had agreed for the arbitration and that in fact the letter dated 13-11-1996 was the arbitration agreement. Referring to the voluminous correspondence between the first respondent and the second respondent as also the financial transactions by them, the learned single Judge also observed that in fact part payment in

respect of the repairs to the said two vessels was also made by the second respondent alone of about Rs.25,00,000/-. The learned single Judge has also made a reference to the initial flat denial on the part of the parties that M/s. Madan Shipping (Private) Limited was not in existence at all and ultimately the acceptance of the fact that the said company was in fact in existence. The learned single Judge then proceeded to hold that the Hon□ble Chief Justice, in so far as the second respondent is concerned, had held that the joining of the second respondent was not done of the party to the arbitration proceedings but the correction of the mistake inasmuch as the arbitration had initially proceeded against M/s.Madan Shipping (Private) Limited and that it was only by way of a mistake that a wrong name came to be mentioned. In short, the learned single Judge has accepted the case pleaded by the first respondent that this was a domestic arbitration and was not an arbitration between the appellant and the first respondent.

10. Learned senior counsel, Shri Sriram Panchu, very vehemently urged that the appellant was very essentially interested in the whole affair as it was the owner of the said two vessels which were repaired by the first respondent. Learned counsel is at pains to point out that ultimately if it is found in favour of the first respondent that it could recover the repair charges for these vessels, it would be these vessels which could be seized. Learned counsel, therefore, urges that the formation of domestic arbitral tribunal was itself incorrect and its proceedings would be rendered all the more without jurisdiction particularly because the ownership of the vessels being that of the foreign company was an accepted position. Learned counsel, therefore, reverts back to Sec.2(1)(f) of the Act and suggests on the basis of the language thereof that it is an arbitration relating to disputes arising out of legal relationship where one of the parties is a foreign national or a body corporate which is incorporated outside India. Learned counsel has taken us extensively through the orders passed by the Hon□ble Chief Justice as also the initial order passed by the arbitral tribunal.

11. As against this, learned senior counsel, Shri Sampathkumar, appearing on behalf of the first respondent, has contended that at no point of time was the appellant ever in picture. Everything was being done by the agents and that the first respondent had taken a calculated risk and was prepared to go ahead with the arbitration proceedings only against the agent and that too in the absence of the appellant, which was the owner of the said vessels. Learned senior counsel suggests that in fact the first respondent had no intentions to join the appellant as a party. However, in deference to some remarks made by the arbitral tribunal members, it had proceeded to make the application, which it did. Learned senior counsel, however, said that he is making an unqualified statement that the first respondent has no claim in these arbitration proceedings against the appellant.

12. There could be no dispute that the appellant is a foreign company. However, one thing is certain from the facts emerging, which were discussed in extenso by the learned single Judge, that the appellant had studiously kept itself out of the whole affair. There are some intrinsic

circumstances on record to suggest that the appellant had kept itself out completely in the background. There can be no doubt again that the initial letters have been signed by M/s. D.B. Madan and Company as agents but when we go through those letters, more particularly the letters dated 13-11-1996 and 17-3-1997, the disclosure of the appellant is significantly absent. It is unthinkable that when the arbitration agreement was entered into by the agent on 13-11-1996, the appellant would not know about it but, however, there is nothing on record that it offered to come at any time. What transpired between the second respondent and the appellant is not the concern of this Court at least in the present matter but the fact remains that in the letter dated 13-11-1996 as also in the initial proceedings before Justice Khadri the appellant remained conspicuous by its absence. It is rather a tall claim to suggest that the appellant was not aware of what was going on in the matter of arbitration. We are, therefore, of the clear opinion that though the appellant has an interest in the matter, being owner of the vessels, the appellant was never a party to the arbitration proceedings nor could the dispute be described as between the appellant and the first respondent.

13. All through, the dispute proceeded as between the first respondent and the second respondent. There can be no doubt that the first respondent had sought to join the appellant as the party and had applied. However, there can also be no doubt that in pursuance thereto the appellant had pleaded that it was a foreign concern and that the arbitration proceedings against them could be only by means of international commercial arbitration in terms of Sec.2(1)(f) of the Act. However, it cannot be ignored that there was in fact no arbitration agreement between the first respondent and the appellant and it was only between the first respondent and the second respondent. The argument that the arbitration proceedings could only be initiated by the Hon□ble Chief Justice of India by naming a third arbitrator has to fail because initially no arbitration agreement was ever there between the first respondent and the appellant at all. Once the first respondent comes out with the clearest possible stand that it had its claim only against the second respondent and once there is an agreement of arbitration between the first respondent and the second respondent, the appellant would be a total stranger to the affairs even if the appellant is the owner of the vessels in question and even after the dispute is about the repairs of those very vessels. One cannot also ignore the fact that all this was going on right from 1996 and it is only for the first time in the year 2001 that the appellant has chosen to surface itself raising the plea that it was an interested party in the matter. Once there is a finding that this was a domestic arbitration being a dispute between the first respondent and the second respondent only and that the appellant had studiously chosen keeping itself away from the dispute there would be no question of taking any exception to the jurisdiction of the arbitral tribunal or for that matter recall of the order of Justice Akbar Basha Khadri appointing the third arbitrator in the matter. We fail to understand as to whether on the basis of the plea raised before Justice Khadri, there could have been an international commercial arbitration. There was nothing before Justice Khadri pleaded by the second respondent that the arbitration was of an international nature. There would, therefore, be no question of recall of that order.

14. Learned senior counsel for the appellant argued that the

appellant has a counter-claim against first respondent. If the appellant has a claim or counter-claim as against the first respondent, it may proceed in the way legally available to it but in so far as the appellant is concerned it does not have any arbitration agreement with the first respondent and, therefore, on that count it could not be said that the order passed by the learned single Judge appointing the third arbitrator was in any way liable to be recalled.

15. We have seen the pleadings before the arbitral tribunal by the respective parties. In its stand, the appellant has firstly pleaded that it came to know about the arbitration proceedings in the second week of July 2001 when it received the letter dated 9-7-2001 from the learned counsel for the first respondent and that it had expressed its surprise in its communication dated 13-7-2001 of being informed at such a late stage about the arbitration proceedings. Very surprisingly, even without there being an arbitration agreement between it and the first respondent, the appellant pleaded that it had counterclaim which it was ready to file against the first respondent before the properly constituted forum of international commercial arbitration. Again, the appellant in no uncertain terms has contended that the appellant had not agreed to refer its dispute to arbitration by the domestic tribunal. It has also suggested that it was not a party to the arbitration proceedings as per the order of the Court nor is it a party in the present arbitration proceedings. The appellant has clearly stated that it is not bound by its agent□s choice as probably the agent had not informed the appellant nor had the appellant consented to the arbitration. If this is so, then, there would be no question of the recall of the order passed by the delegate of the Hon□ble Chief Justice at the instance of the appellant. The Hon□ble Chief Justice, in his order whereby he refused to recall the order passed by his delegate, has clearly given a finding that the first respondent had wanted to proceed only against M/s.Madan Shipping (Private) Limited and M/s. D.B. Madan and Company and did not want to proceed against the appellant and that it was for the arbitrators to consider whether the two respondents were liable to be proceeded against or not. In our view, there would be no question of interference with the order of the learned single Judge or the Hon□ble Chief Justice. We make it clear that if the appellant so feel, it may take appropriate proceedings before the appropriate forum available to it in law.

16. With these, confirming the order passed by the learned single Judge, we dismiss the appeal. No costs.

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Website:Yes

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The Registrar General
High Court
Chennai 600 104
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